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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Hon. David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Ed Carnes, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: May 18, 2004

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II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on May 6 and 7, 2004, in Monterey, California, and took action on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting.

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Second, the Committee considered and recommended amendments to the following Rules:

- Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.
- Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

- Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

The Committee recommends that these rules be published for public comment.

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III. Action Items—Recommendation to Publish Amendments to Rules

The Advisory Committee has considered amendments to a number of rules and recommends that they be published for public comment. The rules are as follows:

A. Action Item—Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

At its Fall 2003 meeting, the Committee considered possible amendments to a number of rules that would provide for electronic transmission of various documents to magistrate judges or the court. A subcommittee, chaired by Judge Anthony Battaglia, studied those rules and proposed amendments that would permit such transmissions. Rule 5, Initial Appearance, is one of those rules. In particular, the proposed amendment to Rule 5 would permit the government to use “reliable electronic means” to transmit the warrant to the magistrate judge. The accompanying Committee Note suggests several factors that a court may consider in determining whether a particular electronic media is reliable. The Committee unanimously approved the amendment. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5 be published for public comment.

B. Action Item—Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

As noted above, the Committee considered possible amendments to several Criminal Rules in order to permit the parties to submit materials to the magistrate judge or the court by electronic means. The Committee believed that the parties should be permitted to do so in Rule 32.1 proceedings, i.e., proceedings involving revocation or modification of probation or supervised release. Again, the Committee Note addresses the issue of what might constitute “reliable electronic means.” The Committee approved the amendment by a unanimous vote. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32.1 be published for public comment.

C. Action Item—Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

Based upon a suggestion from Magistrate Judge Robert Collings, the Committee has considered a conflict in Rules 32.1 and 40 concerning the ability of the court to consider bail in out-of-district cases. Although Rule 32.1(a)(6) permits a court to consider bail in out-of-district proceedings regarding revocation of release,

Rule 40 does not. The Committee unanimously agreed to amend Rule 40 to conform to Rule 32.1. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be published for public comment.

D. Action Item—Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

In conducting a survey of magistrate judges concerning use of electronic transmissions in pretrial proceedings, the Committee determined that there was an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Committee unanimously agreed with an amendment to Rule 41(e) that would permit electronic transmission of the warrant itself. The current rule permits the court to dictate the contents of warrant to the officer for transcription and the execution. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

E. Action Item—Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

Magistrate Judge Nowak e-mailed the Committee to inform it that there was a possible inconsistency between Rules 5, 5.1, and

58, concerning the right of a defendant to a preliminary hearing. The Committee agreed and unanimously proposes that Rule 58(b)(2)(G) be amended by deleting any specific reference to the question of when a defendant is entitled to a preliminary hearing, and instead direct the reader to Rule 5.1, which specifically addresses preliminary hearings. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 58 be published for public comment.

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Attachments:

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Appendix F. Proposed Amendments to Rules 5, 32.1, 40, 41, and 58 for publication.

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

APPENDIX F

**PROPOSED AMENDMENTS TO RULES
FOR PUBLICATION AND COMMENT**

- **Proposed Amendment to Rule 5 & Committee Note**
- **Proposed Amendment to Rule 32.1 & Committee Note**
- **Proposed Amendment to Rule 40 & Committee Note**
- **Proposed Amendment to Rule 41 & Committee Note**
- **Proposed Amendment to Rule 58 & Committee Note**

* New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance

1 * * * * *

2 **(c) Place of Initial Appearance; Transfer to Another**
3 **District.**

4 * * * * *

5 **(3) *Procedures in a District Other Than Where the***
6 ***Offense Was Allegedly Committed.*** If the initial
7 appearance occurs in a district other than where
8 the offense was allegedly committed, the
9 following procedures apply:

10 * * * * *

11 (C) the magistrate judge must conduct a
12 preliminary hearing if required by Rule 5.1
13 ~~or Rule 58(b)(2)(G);~~

14 (D) the magistrate judge must transfer the
15 defendant to the district where the offense
16 was allegedly committed if:

17 (i) the government produces the
18 warrant, a certified copy of the
19 warrant, ~~a facsimile of either,~~ or
20 ~~other appropriate~~ a reliable electronic
21 form of either; and

22 * * * * *

COMMITTEE NOTE

The amendment to Rule 5(c)(3)(C) parallels an amendment to Rule 58(b)(2)(G), which in turn has been amended to remove a conflict between that rule and Rule 5.1(a), concerning the right to a preliminary hearing.

Rule 5(c)(3)(D) has been amended to permit the magistrate judge to accept a warrant by reliable electronic means. Currently, the rule requires the government to produce the original warrant, a certified copy of the warrant, or a facsimile copy of either of those documents. This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41. The reference to a facsimile version of the warrant was removed because the Committee believed that the broader term “electronic form” includes facsimiles.

The amendment reflects a number of significant improvements in technology. First, more courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside

the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term “electronic” is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, that the means used be “reliable.” While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

1 **(a) Initial Appearance.**

2 * * * * *

3 **(5) *Appearance in a District Lacking Jurisdiction.***

4 If the person is arrested or appears in a district
5 that does not have jurisdiction to conduct a
6 revocation hearing, the magistrate judge must:

7 * * * * *

8 (B) if the alleged violation did not occur in the
9 district of arrest, transfer the person to the
10 district that has jurisdiction if:

11 (i) the government produces certified
12 copies of the judgment, warrant, and
13 warrant application, or copies of those
14 certified documents by reliable
15 electronic means; and

16 (ii) the judge finds that the person is the
17 same person named in the warrant.

18 * * * * *

COMMITTEE NOTE

Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term “electronic” is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term “electronic” would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be “reliable.” While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the

warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

1 ~~(a) In General. If a person is arrested under a warrant~~
2 ~~issued in another district for failing to appear as~~
3 ~~required by the terms of that person's release under 18~~
4 ~~U.S.C. §§ 3141-3156 or by a subpoena the person~~
5 ~~must be taken without unnecessary delay before a~~
6 ~~magistrate judge in the district of arrest.~~

7 (a) In General. A person must be taken without
8 unnecessary delay before a magistrate judge in the
9 district of arrest if the person has been arrested under
10 a warrant issued in another district for:

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- 11 (i) failing to appear, as required by the terms of that
12 person's release under 18 U.S.C. §§ 3141-3156
13 or by subpoena; or
14 (ii) violating conditions of release set in another
15 district.

16 * * * * *

COMMITTEE NOTE

Rule 40 currently refers only to a person arrested for failing to appear in another district. The amendment is intended to fill a perceived gap in the rule that a magistrate judge in the district of arrest lacks authority to set release conditions for a person arrested only for violation of conditions of release. *See, e.g., United States v. Zhu*, 215 F.R.D. 21, 26 (D. Mass. 2003). The Committee believes that it would be inconsistent for the magistrate judge to be empowered to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way. Rule 40(a) is amended to expressly cover not only failure to appear, but also violation of any other condition of release.

Rule 41. Search and Seizure

1 * * * * *

2 (d) **Obtaining a Warrant.**

3 * * * * *

4 **(3) *Requesting a Warrant by Telephonic or Other***
5 ***Means.***

6 (A) *In General.* A magistrate judge may issue a
7 warrant based on information
8 communicated by telephone or other
9 reliable electronic means. ~~appropriate~~
10 ~~means, including facsimile transmission.~~

11 (B) *Recording Testimony.* Upon learning that
12 an applicant is requesting a warrant under
13 Rule 41(d)(3)(A), a magistrate judge must:

14 (i) place under oath the applicant and any
15 person on whose testimony the
16 application is based; and

17 (ii) make a verbatim record of the
18 conversation with a suitable recording
19 device, if available, or by a court
20 reporter, or in writing.

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21 * * * * *

22 (e) Issuing the Warrant.

23 * * * * *

24 (3) *Warrant by Telephonic or Other Means.* If a
25 magistrate judge decides to proceed under Rule
26 41(d)(3)(A), the following additional procedures
27 apply:

28 (A) *Preparing a Proposed Duplicate Original*
29 *Warrant.* The applicant must prepare a
30 “proposed duplicate original warrant” and
31 must read or otherwise transmit the
32 contents of that document verbatim to the
33 magistrate judge.

34 (B) *Preparing an Original Warrant.* If the
35 applicant reads the contents of the proposed
36 duplicate original warrant, the ~~The~~
37 magistrate judge must enter ~~the~~ those

38 contents ~~of the proposed duplicate original~~
39 ~~warrant~~ into an original warrant. If the
40 applicant transmits the contents by reliable
41 electronic means, that transmission may
42 serve as the original warrant.

43 (C) *Modifications.* The magistrate judge may
44 modify the original warrant. The judge
45 must transmit any modified warrant to the
46 applicant by reliable electronic means under
47 Rule 41(e)(3)(D) or direct the applicant to
48 modify the proposed duplicate original
49 warrant accordingly. ~~In that case, the judge~~
50 ~~must also modify the original warrant.~~

51 (D) ~~Signing the Original Warrant and the~~
52 ~~Duplicate—Original~~ Warrant. Upon
53 determining to issue the warrant, the
54 magistrate judge must immediately sign the

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original warrant, enter on its face the exact

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date and time it is issued, and transmit it by

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reliable electronic means to the applicant or

58

direct the applicant to sign the judge's name

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on the duplicate original warrant.

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COMMITTEE NOTE

Rule 41(e) has been amended to permit magistrate judges to use reliable electronic means to issue warrants. Currently, the rule makes no provision for using such media. The amendment parallels similar changes to Rules 5 and 32.1(a)(5)(B)(i).

The amendment recognizes the significant improvements in technology. First, more counsel, courts, and magistrate judges now routinely use facsimile transmissions of documents. And many courts and magistrate judges are now equipped to receive filings by electronic means. Indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings may be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using facsimiles and electronic media to transmit a warrant can be both reliable and efficient use of judicial resources.

The term “electronic” is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. Although facsimile transmissions are not specifically identified, the Committee envisions that facsimile transmissions would fall within the meaning of “electronic means.”

While the rule does not impose any special requirements on use of facsimile transmissions, neither does it presume that those transmissions are reliable. The rule treats all electronic transmissions in a similar fashion. Whatever the mode, the means used must be “reliable.” While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

Rule 58. Petty Offenses and Other Misdemeanors

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(b) Pretrial Procedure.

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FEDERAL RULES OF CRIMINAL PROCEDURE

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(2) *Initial Appearance.* At the defendant's initial

5

appearance on a petty offense or other

6

misdemeanor charge, the magistrate judge must

7

inform the defendant of the following:

8

* * * * *

9

(G) ~~if the defendant is held in custody and~~

10

~~charged with a misdemeanor other than a~~

11

~~petty offense, the~~ any right to a preliminary

12

hearing under Rule 5.1, and the general

13

circumstances, if any, under which the

14

defendant may secure pretrial release.

15

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COMMITTEE NOTE

Rule 58(b)(2)(G) sets out the advice to be given to defendants at an initial appearance on a misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating a conflict and some confusion when compared to Rule 5.1(a) concerning the right to a preliminary hearing. Paragraph (G) is

incomplete in its description of the circumstances requiring a preliminary hearing. In contrast, Rule 5.1(a) is a correct statement of the law concerning the defendant's entitlement to a preliminary hearing and is consistent with 18 U.S.C. § 3060 in this regard. Rather than attempting to define, or restate, in Rule 58 when a defendant may be entitled to a Rule 5.1 preliminary hearing, the rule is amended to direct the reader to Rule 5.1.